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In the Supreme Court of the United States

OCTOBER TERM, 1980

HUMBERTO ROSALES-LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the trial judge erred in refusing to ask prospective jurors if petitioner's race or Mexican descent would influence their consideration of the case.

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OPINION BELOW

The opinion of the court of appeals (J.A. 37-50) is reported at 617 F.2d 1349.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1980. A petition for rehearing was denied on May 12, 1980 (Pet. App. B). The petition for a writ of certiorari was filed on May 20, 1980, and was granted on October 6, 1980 (J.A. 51). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to conceal, harbor, shield, and illegally transport aliens, in violation of 18 U.S.C. 371 (Count 1); three counts of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2) (Counts 2-4); and three counts of concealing, harboring, and shielding aliens, in violation of 8 U.S.C. 1324(a)(3) (Counts 5-7). Petitioner was sentenced to serve consecutive prison terms of 18 months on the conspiracy count and five years on each of the six substantive counts.[1] The district court suspended the 30-year sentence on the substantive counts and imposed a five-year term of probation to follow petitioner's release from custody

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[1] The statement in the decision of the court of appeals (J.A. 37) that petitioner was sentenced to five years' imprisonment on each count is wrong.

(J.A. 35-36; Sentencing Tr. G-H). The court of appeals affirmed (J.A. 37-50).[2]

2. As summarized by the court of appeals (J.A. 38-40), the evidence at trial showed that petitioner was an active participant in an illegal alien smuggling operation in Southern California. During the evening of December 10, 1978, one of petitioner's "guides" (Tr. 372) met in Tijuana with three men who had agreed to pay $200 apiece to be smuggled into the United States (Tr. 251, 315). The four traveled by bus from Tijuana to a place near an airport and then unlawfully crossed the international border into the United States on foot (Tr. 250-252, 291, 315). After crossing the border, the guide transported the three men by automobile to a house in Imperial Beach that petitioner shared with co-defendant Virginia Bowling (Tr. 252-255, 291-292, 316-319, 360). Petitioner was waiting and admitted the four men into the garage (Tr. 255, 291-292, 319). The next morning, petitioner concealed the three aliens and the guide in the trunk of a car (Tr. 256,

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[2] Petitioner was committed to the custody of the Attorney General on April 2, 1979; the 18-month sentence on the conspiracy count therefore expired on October 2, 1980. The Immigration and Naturalization Service deported petitioner on October 10, 1980. According to petitioner's counsel, his "true" name is "Jesus Navarro" (Sentencing Tr. C; see also Tr. 360, 376). But petitioner was deported under the name "Martin Gomez-Gonzales" (Br. 2 n.5). Petitioner was deported because he had illegally entered the United States by presenting the alien registration card of Humberto Rosales-Lopez, which he had purchased in Mexico for $100, and because he had no valid entry document of his own. Although petitioner's term of probation will not expire until 1985, "probation supervision is waived * * * while he remains in Mexico" (J.A. 36; Sentencing Tr. H).

292-293, 322). Bowling drove the vehicle containing the four aliens north on Interstate Five and through the San Clemente checkpoint (Tr. 372-373, 232-233, 195-196); petitioner followed in another vehicle (Tr. 373-374, 195-196; see also *id.* at 231-232). After passing the checkpoint, Bowling and petitioner exchanged cars (Tr. 374-375); the guide drove the car containing petitioner and the concealed aliens to an apartment building in Los Angeles (Tr. 196, 294).

When they arrived at the apartment building, the aliens were released from the trunk of the car, and petitioner directed them up the back stairs to a second floor apartment (Tr. 327, 196, 213). At about 12:30 p.m., petitioner, co-defendant David Falcon-Zavala, and one of the aliens who had been transported from Imperial Beach left the apartment to get money to pay petitioner's fee (Tr. 197-198, 246, 260-261, 446, 451). Shortly thereafter, agents of the Immigration and Naturalization Service, who had followed petitioner from the Imperial Beach residence to Los Angeles and maintained surveillance of the apartment (Tr. 192-198, 232-235, 254), arrested petitioner and his cohorts (Tr. 246-247).

3. As authorized by Rule 24(a), Fed. R. Crim. P., and in accordance with the procedure ordinarily used in the Southern District of California (J.A. 40), the trial judge conducted the *voir dire* examination of the jury venire.[3] Petitioner submitted a total of 26 questions for the trial court to ask each of the prospective jurors (J.A. 9-11). The trial judge asked the substance of approximately half of the questions submitted by petitioner (compare J.A. 14-21 and Tr.

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[3] The court rejected petitioner's counsel's request to "personally voir dire the prospective jurors." See J.A. 9, 13; Tr. 140.

142-151 with J.A. 10-11: Questions 1, 2, 3, 4, 5, 8, 9, 10, 11, 13, 15, and 21).[4] Among the questions the trial judge refused to ask was number seven:

> Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?

(J.A. 10, 25; Tr. 157).[5] Nevertheless, the trial judge began the *voir dire* by introducing petitioner to the venire, outlining the nature of the charges, and explaining that the purpose of the questions to be asked was "to make sure that there are no underlying prejudices, there are no underlying reasons why you can't sit as a fair and impartial juror[,] if chosen to do

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[4] The court refused to ask question number 24, "Would you hold it against the defendant who did not testify" (J.A. 11), for the reason that the question would be adequately covered in his instructions to the jury (J.A. 26; Tr. 158). See Tr. 565, 559.

[5] The court also refused to ask the jurors: what questions they would ask themselves if they were on trial (J.A. 11: Question 26); whether they knew any of the jurors better than any other (J.A. 11: Question 19); how many years of formal education they had had (J.A. 11: Question 14); whether any of them spoke Spanish (J.A. 11: Question 23); whether any of them had been the victim of a crime (J.A. 11: Question 16); whether any of them or their close friends had ever testified at a criminal trial or before a grand jury (J.A. 11: Question 17); whether the fugitive status of a co-defendant would influence their evaluation of the case against petitioner (J.A. 11: Question 22); whether they would "feel an obligation to reach a verdict because that was the vote of the majority" (J.A. 11: Question 25); whether they or any of their friends had ever employed illegal aliens (J.A. 10: Question 6); whether any of them had ever served on any jury (J.A. 11: Question 18), and, presumably only if they had, whether they had discussed the verdict after the trial with the parties, counsel, or witnesses in the case (J.A. 11: Question 20).

so in this case" (J.A. 14-15; Tr. 142). After again pointing out the nature of the charges against petitioner, the trial judge asked whether any of the jurors had "any feelings about the alien problem at all" (J.A. 17; Tr. 146; cf. J.A. 10: Question 5). Because of her response to this question, one member of the venire was excused (J.A. 17; Tr. 146). The judge then broadened his inquiry: "Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so" (J.A. 18; Tr. 146-147). Because of her response to this question, another prospective juror was excused (J.A. 18; Tr. 147). Finally, in concluding his examination of the venire, the trial judge asked:

> Does any reason occur to anyone of you why you could not sit in this case as a fair and impartial juror, any reason whatsoever?

(J.A. 21; Tr. 151). No juror responded.

When the examination was completed, the court gave counsel for petitioner and the government an opportunity to explain why further questioning was necessary (J.A. 24; Tr. 156). In support of his position that question seven should have been asked, petitioner's counsel said only that *Aldridge* v. *United States*, 283 U.S. 308 (1931), requires the "explor-[ation] [of] all racial antagonism against my client because he happens to be of Mexican descent" (J.A. 25; Tr. 157).

After petitioner and the government exercised their peremptory challenges, the jury was sworn and seated (J.A. 27-28; Tr. 160-161).

4. On appeal, the Ninth Circuit affirmed the conviction. The court rejected petitioner's contention

that failure to ask a specific question concerning possible bias because of his Mexican ancestry was reversible error *per se* (J.A. 43). Although noting that both the Eighth Circuit and the Third Circuit appear to require "that a racial prejudice question * * * be put to the venire in all cases where the defendant is a member of a minority group" (J.A. 42), the court declined to follow those decisions. Instead, the court held that because there was no "indication that prejudice [was] likely to arise, or that the trial [would] have racial overtones" (*ibid.*), the refusal to ask the question requested by petitioner was not reversible error. Further, the court found "that the voir dire in this case adequately probed the venire for potential bias on all issues" (*id.* at 43). The court of appeals also observed that the statement in *Ristaino* v. *Ross*, 424 U.S. 589, 597 n.9 (1976), suggesting that a question specifically addressed to potential race bias must be asked by a federal court if requested by a black defendant charged with a crime of violence against a white victim, does not govern this case: "[T]he facts of *Ristaino* presented a greater likelihood of prejudice than do the facts of the present case" (J.A. 42).

SUMMARY OF ARGUMENT

The specific issue in this case is whether the district court committed reversible error when it declined to ask the prospective jurors during *voir dire* whether they would consider petitioner's race or Mexican descent in their evaluation of the case. The Court may also desire to use this occasion to address the broader question whether it should, in the exercise of its supervisory powers over the conduct of trials in the federal courts, establish a general re-

quirement that inquiry into racial or national origin bias of prospective jurors be undertaken whenever requested by a criminal defendant.

1. Any claim that the failure to make the requested inquiry in the present case violated petitioner's constitutional rights is wholly insubstantial. This is not a case in which the defendant's ancestry or national origin was "inextricably bound up with" the issues at trial. *Ristaino* v. *Ross*, 424 U.S. 589, 597 (1976). The offenses with which petitioner was charged were essentially victimless crimes. At trial, petitioner did not suggest that his prosecution was motivated by any civil rights activities on behalf of Mexicans or Mexican-Americans or any other activities unrelated to the crimes charged. If the Constitution did not require the propounding of *voir dire* questions regarding potential racial bias on the part of the jurors in *Ristaino*, which involved a black defendant charged with a crime of violence against a white victim, it plainly could not require such questions in the present case.

2. Even though a failure to undertake requested *voir dire* regarding potential racial bias may not be constitutional error in a particular case, it is clear from the holding in *Aldridge* v. *United States*, 283 U.S. 308 (1931), and the dictum in *Ristaino*, *supra*, 424 U.S. at 597 n.9, that there nonetheless may be error as a matter of nonconstitutional federal common law. Whether there is such error involves essentially the same type of inquiry as the constitutional analysis, but there is a lower threshold at which questioning about racial bias is required.

Thus, *Aldridge* and *Ristaino* make clear that some questioning directed at the general subject of racial bias is necessary in federal prosecutions involving interracial crimes of violence. There is nothing in either decision, however, that establishes a *per se*

rule requiring such inquiry in every case involving a defendant of an identifiable racial or ethnic minority group. Indeed, the discussion in *Ristaino* (424 U.S. at 596 n.8) appears to cast considerable doubt on the appropriateness of any *per se* rule.

In the instant case, there is little to suggest that petitioner's race or national origin was likely to play any material role in the jury's deliberations. The offenses charged were victimless crimes, the witnesses against petitioner were Mexican as well as "Anglo," and petitioner's defense did not depend at all on his ancestry or nationality. Indeed, in the colloquy regarding *voir dire*, petitioner pointed to nothing about the specifics of this case that would suggest the need for the proposed questioning, relying instead simply on the erroneous assertion that he was entitled to have his question propounded under a *per se* rule.

The conduct of *voir dire* is committed by the Federal Rules of Criminal Procedure to the sound discretion of the trial court, and there is no basis in this case for concluding that this discretion was abused. In fact, the court dealt effectively with the question of potential bias by asking the jurors about their attitudes toward aliens and the problem of illegal immigration. There is no tenable basis for speculating that petitioner's proposed question would have been any more effective in rooting out potential bias or assuring him a fair trial.

3. It is within the proper realm of this Court's supervisory powers to adopt a *per se* rule on this type of subject if it believes such a rule will usefully contribute to the fair and efficient administration of justice in the federal courts. Nevertheless, there is some question whether this particular requirement

should be promulgated in the context of adjudication, since the Federal Rules already treat the subject of *voir dire* and commit the matter to the discretion of the district court.

In any event, we believe that, while neither the costs nor the benefits of a *per se* rule would be substantial, the balance tips somewhat against the desirability of such an approach. A *per se* rule would reduce the need to litigate the issue on a case-by-case basis, perhaps accomplishing some slight amelioration of the workload of federal courts. But we are skeptical that specific questioning regarding racial or similar bias would be effective in achieving any meaningful improvement in the fairness of juries. Moreover, while brief questioning on the subject would probably be quite harmless, any more substantial probing to uncover latent bias, in cases where race or national origin is not reasonably central, runs a danger of needlessly injecting such issues into the case, as well as unnecessarily discomfiting prospective jurors by public probing of their attitudes on sensitive subjects.

If the Court does elect to announce a new *per se* rule in this case, any such rule should be prospective only. Such a rule would be a prophylactic measure of a quasi-legislative nature; its adoption would not reflect error in petitioner's case, and in the absence of any such error, reversal of his conviction would be wholly inappropriate.

4. Finally, even were this Court to conclude that the district court abused its discretion in this case by failing to propound the inquiry requested by petitioner, any such error was harmless in the circumstances here and does not warrant reversal of his conviction. This is so both because the questions that were asked during *voir dire* were largely effective to

deal with potential bias stemming from petitioner's Mexican ancestry, and also because the evidence against petitioner was so strong that one may conclude with reasonable assurance that his conviction was not the product of any hidden juror bias that might have been brought to light by the questions he requested.

ARGUMENT

THE TRIAL COURT'S REFUSAL TO ASK THE VENIRE A SPECIFIC QUESTION CONCERNING PETITIONER'S ANCESTRY WAS NOT REVERSIBLE ERROR

A. There Was No Error Of Constitutional Magnitude

In *Ham* v. *South Carolina*, 409 U.S. 524 (1973), this Court held that a black civil rights activist well known in his community for his work with the Southern Christian Leadership Conference and the Bi-Racial Committee of the City of Florence was constitutionally entitled to have the trial judge ask the venire a brief question "sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain" (*id.* at 527). The defendant had been charged with possession of marihuana in violation of state law. At trial, his defense was that "law enforcement officers were 'out to get him' because of his civil rights activities, and that he had been framed" (*id.* at 525). *Ham* does not, however, establish a constitutional rule of "universal applicability." *Ristaino* v. *Ross*, *supra*, 424 U.S. at 596. Only if issues of race are "inextricably bound up with" the issues that will arise at trial is a court constitutionally required to inquire specifically as to the possibility of racial prejudice. *Id.* at 597. Otherwise, "the State's obligation to the defendant to impanel an impartial jury * * * can be satisfied by less than an inquiry into a

specific prejudice feared by the defendant." *Id.* at 595 (footnote omitted).

Petitioner's national origin was not "inextricably bound up with" the questions at trial. Petitioner was charged with conspiracy to smuggle illegal aliens into the United States in violation of 18 U.S.C. 371 and six substantive counts of harboring and transporting illegal aliens in violation of 8 U.S.C. 1324. His defense at trial was that his partners in the criminal enterprise testified falsely against him and that he was merely an unwitting accomplice in the offenses (see Tr. 177-183, 531-535, 538-553).[6] Petitioner offered no evidence in support of this theory. The jurors understandably accepted the strong and uncontradicted evidence offered by the government and inferred that petitioner knowingly and willfully participated in the conspiracy as well as the substantive crimes charged.

Petitioner suggests (Br. 18 & n.28) that because the Immigration and Nationality Act of 1952 has "been characterized as racist" a specific inquiry concerning his national origin was constitutionally required. Whether the Immigration Act of 1952 is "racist" was not an issue at trial. Petitioner at no time suggested to the jury that he should be acquitted of the crimes charged because the Act was "racist." Therefore, that the legislation enacting most of the particular offenses charged has been "characterized as racist" is of no consequence. Even if the characterization were accurate, it would provide no basis

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[6] Petitioner also argued that he should be acquitted of harboring and transporting one of the aliens because the alien's name was misspelled in the indictment (Tr. 535-536).

for holding that a specific inquiry concerning petitioner's national origin was constitutionally required.[7]

Next, petitioner argues (Br. 18) that because the "principal Government witness against [him] was a white Anglo [Bowling]," the inquiry concerning his national origin was constitutionally required. The race or national origin of a witness against the defendant can surely be of no greater constitutional significance than the race of the victim. In *Ristaino*, this Court expressly rejected the contention that "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were [black]" was sufficient to invoke the constitutional rule announced in *Ham*. *Ristaino* v. *Ross*, *supra*, 424 U.S. at 597. The same conclusion is required *a fortiori* in this context.[8] Petitioner never suggested that Bowling's testimony was motivated by his Mexican ancestry.

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[7] Petitioner, of course, did not suggest to the trial court that the inquiry was required in this case because of the general character of the Immigration Act.

[8] Petitioner asserts (Br. 18) that "any latent racial antagonism of * * * Anglo juror[s] towards * * * Mexican[s]" could have been "aggravated" by Bowling's testimony that he "lived in her house with her daughter as her daughter's lover and was supported by * * * [Bowling]." While such a fact, if central to the issues at trial, might tend to support the appropriateness of an inquiry into potential juror bias, it is not grounds for relief in the present case. To begin with, that testimony was elicited by petitioner himself (J.A. 31-33; Tr. 397-408), but petitioner never suggested to the trial judge during the colloquy about *voir dire* that his intention to elicit such testimony was a reason for asking question seven (see J.A. 25; Tr. 157). Further, neither petitioner's living arrangements nor his romantic involvement with Bowling's daughter was an issue in this trial, and the brief passing reference to these matters seems to us unlikely to have had an untoward influence on the jury's deliberations.

Rather, his attack on Bowling's credibility was based on her admitted alien smuggling activities and her asserted agreement with the government to testify in exchange for leniency (see Tr. 182-183, 534, 538-539, 540-542, 547).[9] In addition, with one minor exception, there was no reference to petitioner's Mexican ancestry anywhere in the testimony of the witnesses or the arguments of counsel.[10]

B. The Failure To Make The Specific Inquiry Requested By Petitioner Was Not Error As A Matter Of Nonconstitutional Federal Law

1. There Is No Existing Federal Rule Requiring Inquiry Into Potential Race Or National Origin Bias Whenever Requested By A Criminal Defendant

This Court's decision in *Aldridge* v. *United States*, *supra*, and dictum in *Ristaino* v. *Ross*, *supra*, 424 U.S. at 597 n.9, indicate that there are some circumstances in which a federal court must ask prospective jurors a specific question concerning potential racial prejudice even if such a question is not constitutionally required.[11] The difference between the federal

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[9] Petitioner attacked the credibility of Falcon-Zavala and the three illegal aliens on similar grounds (see Tr. 182, 183, 534, 540-542, 547, 551). As to the INS agents who testified against him, petitioner simply argued that although their testimony was credible, their observations were consistent with innocence (Tr. 540-541).

[10] An INS agent testified that after Bowling and petitioner had exchanged cars, he saw two "male Mexican Latins" in the front seat of the car used to transport the illegal aliens to Los Angeles (Tr. 234). Petitioner was the man sitting on the passenger side of the car.

[11] *Aldridge* has come to be regarded as a holding that questions *specifically* addressed to potential racial prejudice may sometimes be required in federal court. See, *e.g.*, *Ristaino* v. *Ross*, *supra*, 424 U.S. at 597 n.9; *Ham* v. *South Carolina*,

common law rule adopted in *Aldridge* and the constitutional rule applied in *Ham* is, we believe, quantitative and not qualitative. That is, the degree to which a case must implicate race or national origin is less under the federal common law standard than under the constitutional standard, but the analysis is essentially the same under either. While a specific question is constitutionally required only if issues of race are "inextricably bound up with" (*Ristaino* v. *Ross*, *supra*, 424 U.S. at 597) the issues at trial, under the federal common law standard a specific inquiry should be made whenever it is requested and the facts of the case or the nature of the charge or the defense carry substantial potential for activating racial bias among the jurors. The likelihood that racial bias will be a significant factor in the trial remains the touchstone of both standards, with discretion reposing in the trial court to deal with the particular circumstances of the case before it, rather than being bound by any automatic or *per se* rule.

Thus, this Court has never suggested that a federal district court must ask specific questions concerning race or national origin whenever requested to do so by the defendant, without regard to the circumstances of the case. Nevertheless, some courts of appeals have erroneously relied on *Aldridge* to support a sweeping *per se* rule, requiring questions specifically

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supra, 409 U.S. at 526. It should be noted, however, that on its facts the only question presented in *Aldridge* was whether some question "cover[ing] the subject" was required (283 U.S. at 311). The dictum in *Ristaino* clearly suggests the view that a specific question concerning racial prejudice is required in federal courts when requested by a black defendant who is charged with a crime of violence against a white victim (the holding in *Ristaino* is that the Constitution does not require such a question under those circumstances).

directed to racial prejudice whenever the defendant is a member of a minority group. See, *e.g.*, *United States* v. *Carter*, 440 F.2d 1132, 1134-1135 (6th Cir. 1971); *United States* v. *Gore*, 435 F.2d 1110, 1111-1112 (4th Cir. 1970); *Frasier* v. *United States*, 267 F.2d 62, 66 (1st Cir. 1959).[12] The holding in *Aldridge* contains no such rule. The passage generally cited as supporting the broad rule is as follows (283 U.S. at 314-315):

> The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

As the passage itself indicates, the Court simply rejected the notion that specific questions directed at racial prejudice "were barred."[13] The Court did not purport to hold that specific questions directed to-

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[12] See also *United States* v. *Williams*, 612 F.2d 735, 736-737 (3d Cir. 1979), cert. denied, 445 U.S. 934 (1980); *United States* v. *Bowles*, 574 F.2d 970, 971-973 (8th Cir. 1978); *United States* v. *Robinson*, 485 F.2d 1157, 1158-1159 (3d Cir. 1973); *United States* v. *Powers*, 482 F.2d 941, 944 (8th Cir. 1973) (dictum).

[13] Indeed, most of the opinion is devoted to demonstrating that the trial judge had erred in holding that such inquiries were "improper." See *Aldridge* v. *United States*, *supra*, 283 U.S. at 311-313.

ward racial prejudice are required whenever requested by a defendant and without regard to the nature of the case. See, *e.g.*, *Ham* v. *South Carolina*, *supra*, 409 U.S. at 526; *United States* v. *Polk*, 550 F.2d 1265, 1267 (10th Cir.), cert. denied, 434 U.S. 838 (1977); *United States* v. *Perez-Martinez*, 525 F.2d 365, 366-368 (9th Cir. 1975); *United States* v. *Diggs*, 522 F.2d 1310, 1317-1319 (D.C. Cir. 1975), rehearing denied, 535 F.2d 1299 (1976); *United States* v. *Walker*, 491 F.2d 236, 239 (9th Cir.), cert. denied, 416 U.S. 990 (1974); see also *Ristaino* v. *Ross*, *supra*, 424 U.S. at 597 n.9. And, of course, the facts of *Aldridge*—a black defendant charged with murdering a white police officer—were quite likely to inflame racial passions and therefore afford no foothold for distilling from its holding any broad rule applicable to cases in which race appears to be a negligible factor.

Similarly, while the Court in *Ristaino*, another prosecution for a crime of interracial violence, stated that *voir dire* questioning directed to racial prejudice would have been required of a federal court "faced with the circumstances here" (424 U.S. at 597 n.9), that statement hardly supports a *per se* federal rule. Rather, like the decision in *Aldridge*, it simply indicates that when the particular circumstances of a case involve a high probability that racial bias could intrude into the jury's deliberations, some questioning of prospective jurors directed to racial bias will be required. Indeed, the discussion of the constitutional issue in *Ristaino* reflects some aversion to a *per se* rule (424 U.S. at 596 n.8):

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that jus-

> tice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion. See *Connors* v. *United States*, 158 U.S. 408, 415 (1895).

A further intimation of the Court's uneasiness with a *per se* rule is its observation that the logic of such a rule is not limited to race but would apply with equal force whenever questioning about ethnic origin, religious affiliation, or national origin is requested (424 U.S. at 596 n.8).[14]

2. The Likelihood of Juror Bias Against Petitioner Because of His Mexican Ancestry Was Insufficient in the Circumstances of this Case to Require the Inquiry as a Matter of Federal Nonconstitutional Law

In *Aldridge*, the trial court failed to "ask any question which could be deemed to cover the subject" of racial bias (283 U.S. at 311). The defendant in *Aldridge* was a black man accused of murdering a white policeman. The penalty for the crime was death. On those facts (see *Ham* v. *South Carolina*, *supra*, 409 U.S. at 526), the Court held that the refusal to allow any question concerning racial prejudice was an abuse of discretion. The facts of *Aldridge* are so different from those of the instant case that it provides no support for petitioner's claim that the trial judge erred in refusing to ask a specific question concerning petitioner's "race or Mexican descent."

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[14] The list could no doubt be extended. For no matter what the particular bias or prejudice is, if it would prevent a juror from being fair and impartial the defendant arguably should be allowed to ask a specific question. Indeed, the more remote or farfetched the particular prejudice is, the greater is the arguable need for a specific question focusing the attention of prospective jurors.

In *Aldridge* the defendant faced the death penalty. This Court has often suggested that in such cases the trial judge's discretion is more narrowly confined than in cases in which the defendant's life is not at stake. See, *e.g.*, *Beck* v. *Alabama*, No. 78-6621 (June 20, 1980), slip op. 11-12. More importantly, interracial crimes of violence are significantly more likely to evoke racial hostility than the victimless crimes charged in this case, for at least two reasons. First, the fact that a case involves a defendant of one race and a victim of another may stimulate a kind of "us against them" attitude on the part of some jurors of the victim's race. Second, violent crimes are inherently more likely to evoke strong emotional reactions, thus increasing the danger that at least some of the jurors may be swayed by irrationality (*i.e.*, racism).[15] These considerations are not present here.

Moreover, unlike the trial court in *Aldridge*, the judge in this case inquired whether the nature of the crimes charged would affect any juror's impartiality (J.A. 18; Tr. 146-147), asked at least two questions that "could be deemed to cover the subject" (*Aldridge* v. *United States*, *supra*, 283 U.S. at 311) of bias against persons of Mexican descent, and emphasized the duty of the jurors to decide the case on the evidence presented at trial, "without regard to sympathy, prejudice[,] or passion for or against the defendant in this case" (Tr. 558; see *id.* at 587).

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[15] In addition to the victimless nature of the crimes charged in this case, petitioner's partnership with Bowling, "a white Anglo," makes it particularly unlikely that the jurors perceived petitioner's activities along strictly "racial" lines or regarded his ancestry as significant. Although Bowling testified, implicating petitioner in the smuggling operation, she also stated that he was a "nice person" and that she could not say anything "bad" about him (Tr. 407).

Compare *Ristaino* v. *Ross*, *supra*, 424 U.S. at 592-593 n.4.

The language of Fed. R. Crim. P. 24(a) specifically affirms the breadth of the district court's discretion as to the scope, content, and form of the questions posed as well as the manner of conducting the *voir dire* (emphasis added):

> The court *may permit* the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors *or may itself conduct the examination.* In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry *as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.*

This Court has repeatedly commented on the broad discretion necessarily accorded trial judges in conducting jury *voir dire*:

> *Voir dire* "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." *Connors* v. *United States*, 158 U.S. 408, 413 (1895); see *Ham*, *supra*, at 527-528; *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). This is so because the "determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." *Rideau* v. *Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting).

Ristaino v. *Ross*, *supra*, 424 U.S. at 594-595. Thus, unless it can be said that the district court abused

its discretion in failing to ask the specific question tendered by petitioner in light of the circumstances of this case, there was no error. See, *e.g.*, *United States* v. *Dennis*, 183 F.2d 201, 227-228 (2d Cir. 1950) (L. Hand, J.), aff'd, 341 U.S. 494 (1951).

For several reasons, we think it clear that there was no abuse of discretion in this case. First, petitioner suggests no reason for presuming that the general questions asked by the court were less likely to uncover prejudice against people of Mexican ancestry than his more specific question.[16] Indeed, it may be that the general questions asked by the court were more effective than the specific question suggested by petitioner would have been. As noted by Judge Moore, dissenting in *Ross* v. *Ristaino*, 508 F.2d 754, 759 (1st Cir. 1974), rev'd, 424 U.S. 589 (1976), "[f]ew jurors will reveal the innermost workings of their minds—particularly in public." [17]

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[16] Indeed, in support of the suggestion that this Court should "restructure" (Pet. Br. 20) the federal *voir dire* system, petitioner seems to assert that the sort of question approved in *Ham* v. *South Carolina*, *supra*, is "useless and ineffective" (*ibid.*). It is not clear why petitioner's question seven is not subject to the same characterization. Presumably, if each of the panel members had indicated that he or she would not "consider the race or Mexican descent of [petitioner] in * * * evaluat[ing] * * * [the] case," there would have been no reason to ask the open-ended second question.

[17] See generally Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491, 531 (1978); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 Stan. L. Rev. 1493, 1503, 1506 nn.55-56, 1524 (1975); see also *United States* v. *Dennis*, *supra*, 183 F.2d at 227-228.

Fewer still are likely to profess their own racism in public. Here, the general questions asked allowed each juror to indicate his partiality, without being called upon to explain its basis or having it inferred from the nature of the question.

In any event, neither the facts of this case nor the nature of the charges against petitioner were such that petitioner's national origin is likely to have been significant. Indeed, petitioner seems to have accepted this view of the case at trial, since the only reason he adduced for asking his question seven was that *Aldridge* required the question simply because petitioner was of Mexican descent (see J.A. 25; Tr. 157).

Petitioner now argues (Br. 18) that because of the assertedly "racist" character of the Immigration Act, Bowling's status as a witness against him, his living arrangements with Bowling, and his relationship with Bowling's daughter, the trial court's refusal to ask the question tendered was contrary to the "guidelines established by this Court for federal courts." These factors are no more persuasive as reasons for requiring a specific question directed to the defendant's national origin under the federal common law rule than they are as reasons for requiring such a question as a matter of constitutional command. First, as noted above, petitioner failed to suggest any of these factors to the trial court as a basis for asking the question. Second, even if the trial court had been aware of the presently stated basis of petitioner's concern, none of these factors is so significant that nothing less than a specific inquiry could suffice. They are all quite peripheral to the issues that were before the jury, and surely none of them is as likely to invoke hostility or aggravate "latent racial antagonism" as

interracial violence (*ibid.*).[18] When the reasons for asking a specific question rather than a general one fairly covering the subject are no more compelling than those asserted here, the trial court's exercise of its discretion should be sustained.

3. *There Are No Compelling Reasons For This Court To Adopt A Per Se Rule In The Exercise of Quasi-Legislative Supervisory Power*

We have argued above that this Court's prior decisions do not establish any *per se* rule requiring questions about racial or national origin bias on *voir dire* whenever requested by the defendant in a criminal case. We have further contended that the circumstances of the present case are not sufficiently likely to provoke damaging bias against a defendant of Mexican descent to render the refusal to ask petitioner's proposed question an abuse of discretion under the federal common law rule. Even though there was no error in this case, the Court may wish to use the occasion, as some courts of appeal have done in similar cases,[19] to consider whether to exercise its supervisory

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[18] We recognize that testimony reflecting a romantic relationship between petitioner and Bowling's daughter touches upon an area where bias is quite prevalent. If that subject had been more material to the resolution of the issues at trial, a closer question might be presented. However, the matter appears to be pertinent only to the jury's assessment of Bowling's credibility (and only barely material even there), it was injected into the case by petitioner himself, and it was not called to the court's attention at the time of *voir dire*.

[19] See, *e.g.*, *United States* v. *Williams*, *supra*, 612 F.2d at 736; *United States* v. *Bowles*, *supra*, 574 F.2d at 971-973; *United States* v. *Robinson*, 466 F.2d 780 (7th Cir. 1972); *United States* v. *Carter*, *supra*; *United States* v. *Gore*, *supra*; *Frasier* v. *United States*, *supra*, 267 F.2d at 66.

powers over the administration of justice in the lower federal courts to announce a new *per se* rule (or, conversely, to disapprove the *per se* approach of some of the circuits).[20]

We preface our remarks on this subject by noting that we believe this kind of rule, whatever its wisdom, is well within the acknowledged and proper scope of the supervisory powers of a federal appellate court. At issue here is not a controversial attempt to utilize judicial supervisory power to oversee the comportment of the Executive Branch (compare *United States* v. *Jacobs*, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978)), but rather the regulation of the manner in which federal trial judges conduct trials. On the other hand, because the subject of juror *voir dire* is already addressed by Fed. R. Crim. P. 24(a), which confers broad discretion upon federal district judges and is arguably inconsistent with a *per se* rule, it may well be inappropriate to deal with the topic in a quasi-legislative fash-

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[20] Petitioner argues at length (Br. 19-27) that, in the exercise of its supervisory power, this Court should "restructure the judicial approach to *voir dire* in [the] federal courts" (*id.* at 20), "requir[ing] federal courts to permit *voir dire* by counsel for a period not to exceed 30 minutes each side and * * * the use of open-ended questions or techniques * * *" (*id.* at 27). That question is not fairly encompassed by the question on which this Court granted certiorari and therefore should not be considered. Sup. Ct. R. 21.1(a). Nor was the claim raised in the court of appeals. See *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). In any event, the suggestion is patently insupportable since it would require this Court to invalidate Rule 24(a), Fed. R. Crim. P., on little more than policy considerations.

ion in a particular case. The Court may accordingly prefer to leave the matter for further consideration, if any is needed, through the rule amendment procedures. See 28 U.S.C. 331.

It is our view that neither the costs nor the benefits of a *per se* rule would be very substantial, but on balance it seems to us preferable not to adopt such an approach. The principal benefit we perceive in such a rule is that it might be somewhat less burdensome for the courts to administer than the present case-by-case approach. It may also be that the inquiry, if regularly made even in cases where there is no evident need for it, will occasionally bring to light a disqualifying juror bias, although we are skeptical about the efficacy of such specific questioning about bias. We reiterate in this connection our view that there is little basis for assuming that a venire member would be more likely to confess racism or bigotry in response to a specific question than in response to the potentially less embarrassing general questions of the type that were asked in this case.

On the other hand, the costs of adopting a *per se* rule are not likely to be substantial, so long as the questioning is kept simple and brief. But a series of questions designed to probe each prospective juror's racial attitudes "meaningfully" runs the danger of injecting racial issues in a case where they would otherwise play no role, and may also needlessly embarrass prospective jurors. In addition, a decision in this case to require questioning about national-origin bias will open the door to claims that the *per se* rule should embrace a host of other areas in which juror bias could potentially interfere with fair adjudication. These are the kinds of considerations that ap-

pear to have prompted the Court's rejection of a constitutional *per se* rule in *Ristaino* (424 U.S. at 596 n.8), and they have similar force with respect to a non-constitutional federal rule.

Should this Court elect to employ the instant case as a vehicle to announce a new *per se* rule requiring the district courts to inquire upon request into potential racial or national-origin bias, such a rule should be made wholly prospective in effect, and petitioner's conviction should not be reversed. The district court's refusal to make specific inquiry into the subject was fully in accordance with constitutional requirements and with the power conferred by Fed. R. Crim. P. 24(a). There has been no showing that petitioner's right to a fair trial was impaired, because the specific circumstances of his prosecution render it most unlikely that juror bias on account of his Mexican ancestry played any role in the verdicts. The purpose of the new rule would essentially be prophylactic, and it would be adopted in large part to serve interests of judicial convenience. Under such circumstances, reversal of his error-free conviction would be entirely inappropriate.

Although a litigant is generally given the benefit of a new rule established in his case, there is no jurisprudential necessity that a new rule invariably be applied in the case in which it is announced. Compare *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967), with *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *James* v. *United States*, 366 U.S. 213 (1961). When the courts of appeals have announced broad new *per se* rules governing trial procedure, they have often given those

rules wholly prospective effect.[21] Such rules are essentially legislative and are only incidentally related to the facts of the cases in which they are announced; like legislation, they should apply only prospectively.

C. Even If Error Was Committed, It Does Not Support Reversal Of Petitioner's Convictions

Even if under the federal common law rule the district court should have asked petitioner's question seven, any error in its failure to do so in the circumstances of this case was harmless and does not justify reversal of petitioner's convictions. First, the questions that were asked of the prospective jurors regarding their attitudes toward aliens and the problem of illegal immigration were as likely as petitioner's question to be effective in rooting out actual or latent bias. Although petitioner correctly points out

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[21] See, *e.g.*, *United States* v. *Cornwell*, 625 F.2d 686, 688-689 (5th Cir. 1980) (hearing required prior to extension of probation); *United States* v. *James*, 590 F.2d 575 (5th Cir. 1979) (en banc) (procedure for determining admissibility of co-conspirator statements); *United States* v. *Garrett*, 574 F.2d 778 (3d Cir.), cert. denied, 436 U.S. 919 (1978) (*Mann* instruction disapproved); *United States* v. *Chiantese*, 560 F.2d 1244, 1255-1256 (5th Cir. 1977) (same); *United States* v. *Parker*, 549 F.2d 1217, 1224 (9th Cir.), cert. denied, 430 U.S. 971 (1977) (preservation of FBI rough notes for defendant's use in cross-examination); *Bryan* v. *United States*, 492 F.2d 775, 781 (5th Cir. 1974) (guilty plea procedures); *United States* v. *Silvern*, 484 F.2d 879, 882-883 (7th Cir. 1973) (*Allen* charge; ABA version adopted); *United States* v. *Foster*, 469 F.2d 1, 4-5 (1st Cir. 1972) (judicial inquiry required in cases of joint representation of co-defendants by single attorney); *United States* v. *Bush*, 416 F.2d 823, 826 (D.C. Cir. 1969) (malice instruction modified); *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969) (*Allen* charge disapproved).

(Br. 17) that "alienage" is not the same as either "race or national origin," on the facts of this case it is a distinction without a difference.

The members of a venire from the Southern District of California are surely aware that California is bordered on the south by Mexico. Therefore, when the judge asked (J.A. 18; Tr. 146-147), "Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so," the jurors doubtless understood him to mean or, at the very least, include Mexican aliens. In reviewing the adequacy of the trial court's *voir dire*, this Court should read the questions asked as the venire probably understood them.[22]

Further, the name under which petitioner was indicted, Humberto Rosales-Lopez (but see note 2, *supra*), almost certainly suggested to each of the prospective jurors that petitioner was of Spanish descent. In addition, the trial judge introduced petitioner to the panel.[23] Therefore, when the trial court asked (J.A. 21; Tr. 151; emphasis added), "Does *any*

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[22] Petitioner's assertion (Br. 17-18) that the trial court's inquiries "tended to protect the Government's right to a fair trial by locating jurors who may have felt that laws penalizing poor people who come to the United States seeking only a place to work were unfair and unjust" is without any support in the record. Each of the court's questions in this area was broad enough to include any bias either for or against petitioner. The trial court wisely did not permit the two jurors who indicated bias to elaborate in open court, for fear of affecting the other venire members.

[23] Since petitioner was concerned that members of the panel might be biased against people of Mexican ancestry, it may be assumed that petitioner believed that either his name or his physical appearance was sufficient to indicate his Mexican ancestry.

reason occur to anyone of you why you could not sit in this case as a fair and impartial juror, *any reason whatsoever?*", the jurors presumably understood him to be referring at least in part to petitioner's apparent Mexican ancestry. See *Ross* v. *Ristaino*, 508 F.2d 754, 759-760 (1st Cir. 1974) (Moore, J., dissenting), rev'd, 424 U.S. 589 (1976); cf. *United States* v. *Peterson*, 483 F.2d 1222, 1227-1228 (D.C. Cir.), cert. denied, 414 U.S. 1007 (1973). The trial court also told the venire that the purpose of all of his questions was "to make sure that there are no underlying prejudices, there are no underlying reasons why you can't sit as * * * fair and impartial juror[s] if chosen to do so in this case" (J.A. 14; Tr. 142). In sum, there is no basis for speculation that the court's questioning was inadequate to identify and eliminate bias against persons of Mexican ancestry but that petitioner's proposed question would have been effective to that end.

In addition, the evidence against petitioner was overwhelming, thus virtually eliminating any possibility that the jury's verdicts were the product of undisclosed bias against him. Bowling and Falcon-Zavala, two of petitioner's co-venturers, testified at length concerning his role in the smuggling operation (Tr. 367-375, 424-435, 451-452). Each of the three illegal aliens who were smuggled across the border and to Los Angeles testified against petitioner (Tr. 248-288, 288-307, 313-335). It was petitioner who was at the garage waiting when the illegal aliens arrived (Tr. 255); it was petitioner who closed the trunk of the car used to transport the aliens to Los Angeles (Tr. 293, 322); it was petitioner who opened the trunk to let the guide out to drive the car after he and Bowling had exchanged cars (Tr. 258-259); it was petitioner who directed the three aliens to the

second floor apartment in Los Angeles (Tr. 327); and it was petitioner who went with one of the aliens to collect his $200 fee (Tr. 259-261). INS agents watched petitioner follow Bowling through the San Clemente checkpoint and turn off at Camino Real. The agents then saw petitioner riding in the car used to transport the aliens (Tr. 195-196), followed him to the Los Angeles apartment that they knew was a holding point for illegal aliens, saw him enter the apartment with the three aliens (Tr. 196), and arrested him as he went to collect his fee (Tr. 260-261).

This case involves at most a technical violation of a nonconstitutional prophylactic rule intended to provide limited additional protection for the defendant in securing a fair and impartial jury. The rule represents a policy judgment that in some cases a specific question concerning potential racial bias should be posed during *voir dire* in addition to whatever other questions are asked. If, in a particular case, the *voir dire* is sufficient to assure that the jury is in fact fair and impartial, thus effectively satisfying the purpose of the rule, the defendant has no legitimate basis for complaint, and the failure to ask the specific question provides no basis for reversal. Depending on all the surrounding circumstances, including the extent to which race or national origin is implicated by the facts of the case and the questions that were actually asked, the failure to ask a specific question in a particular case may often be wholly insignificant.[24]

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[24] In *Aldridge* the facts clearly implicated race and the district court asked no questions covering potential racial bias. There was, on those facts, no basis for finding harmless error since the likelihood of bias, in fact, was substantial. See also *Morford* v. *United States*, 339 U.S. 258 (1950), in

We acknowledge that when jury selection procedures systematically exclude identifiable groups of individuals from the pool of potential jurors, this Court has reversed the resulting judgment without inquiry as to actual prejudice. *E.g.*, *Duren* v. *Missouri*, 439 U.S. 357 (1979); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Peters* v. *Kiff*, 407 U.S. 493 (1972).[25] That is because, in such cases, the jury is constitutionally defective and therefore incompetent to return any verdict sufficient to support the deprivation of life, liberty, or property: "Due process requires a competent and impartial tribunal * * *." *Peters* v. *Kiff*, *supra*, 407 U.S. at 501; see *id.* at 505.[26] The claimed error in this case, however, does not affect the competence of the tribunal; nor is the asserted violation of the procedural rule involved in this case the sort of error that necessarily affects the entire

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which this Court reversed the conviction of the Executive Director of the National Council of American-Soviet Friendship, Inc., because the trial court refused to allow the defendant to question "prospective government employee jurors * * * with specific reference to the possible influence of the 'Loyalty Order,' * * * on their ability to render a just and impartial verdict." *Id.* at 259. In *Morford* as in *Aldridge* there was a substantial likelihood that the jurors were not impartial in fact.

[25] See also *Castaneda* v. *Partida*, 430 U.S. 482 (1977); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946); *Strauder* v. *West Virginia*, 100 U.S. 303 (1879).

[26] *Tumey* v. *Ohio*, 273 U.S. 510 (1927), of course, also rests on this principle. For if a judge has a financial interest in the outcome of the litigation, he is incompetent and his judgment necessarily invalid without regard to whether he is actually influenced by his financial interest. See *id.* at 522, 532, 535.

proceedings.[27] Therefore, assuming that on the facts of this case the failure to ask the specific question tendered was error, it is nevertheless appropriate to consider whether petitioner suffered any substantial prejudice to his rights and to decline to reverse his conviction if none is shown. See, *e.g.*, *United States* v. *Johnson*, 527 F.2d 1104, 1106-1107 (4th Cir. 1975); *United States* v. *Grant*, 494 F.2d 120 (2d Cir.), cert. denied, 419 U.S. 849 (1974).[28]

Petitioner erroneously states (Br. 19 n.30) that "[i]n *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), this Court held: 'The denial or impairment of the right [to probe on *voir dire*] is reversible error without a showing of prejudice [citations omitted.].' " The material in brackets was added by petitioner. In *Swain* this Court held (1) that the evidence in the record was insufficient to establish a *prima facie* case of purposeful discrimination in the selection of jurors and (2) that the allegation that the county prosecutor peremptorily struck all black members of the venire was insufficient to support a motion to strike the entire jury. As is clear from the full context of the sentence quoted in petitioner's brief and the omitted citations, the Court was considering the right to exercise peremptory challenges and not any "right to

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[27] Compare the denial of a defendant's right to counsel, which is a systemic error affecting the validity of the proceedings and requiring reversal without inquiry as to actual prejudice. See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[28] In *Peters* v. *Kiff*, *supra*, the Court held that a white defendant could challenge the systematic exclusion of blacks from the pool of prospective grand and petit jurors. As noted in the text, any jury selected from such a pool is incompetent, and therefore *Peters* provides no support for petitioner's assertion (Br. 19) that failure to ask a specific question in violation of the federal common law rule is necessarily reversible error.

probe on *voir dire*." The passage from *Swain* accordingly could not mean that the denial or impairment of the latter "right" is always reversible error. Indeed, this Court's holdings in *Ham* and *Ristaino* [29] plainly imply that there is no such right.[30]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1980

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[29] In *Ham*, the Court observed that "either of the brief, general questions" suggested by the accused in that case would have been sufficient (409 U.S. at 527). In *Ristaino* v. *Ross*, *supra*, this Court held that the defendant had no "right" to ask even one question specifically directed to potential racial prejudice.

[30] Those courts of appeals that have held the refusal to ask a specific question focusing on the defendant's race or national origin to be automatic reversible error, without considering the questions that were asked, the likelihood of harm to the accused, and the facts of the particular case, see, *e.g.*, *United States* v. *Bowles*, *supra*, 574 F.2d at 971-973, have ignored both the language of Fed. R. Crim. P. 52(a) and society's interest in a reasonably efficient system of criminal justice.

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